Supreme Court, U.S.
FILED

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

WAYNE L. PATRICK,

PETITIONER

v.

UNITED STATES OF AMERICA,
JOSEPH OWCZAREK,
BRENDA LEONARD.

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Wayne L. Patrick
2863 Chestnut Run Drive
Bloomfield Township, Mi. 48302
In Proper Person
Pro-Se

62 pp

QUESTIONS PRESENTED

I. Whether Congress in creating the district court. Though the constitution of the United States Art. III § 1 has the authority under Title 28 U.S.C.A. § 551 to issue a final order to dismiss complaint for failure to state a claim upon which relief can be granted.

II. Whether through an Act of Congress Title 28 U.S.C.A. § 1654, and Local District Court Rule 110.4 of the Local Rules for the United States District Court Eastern District of Michigan Southern Division violates the Petitioner's First and Fifth Amendment Rights as secured by the constitution of the United States.

III. Whether through an Act of Congress Art. 1 § 8 Ch. 1 - The Internal Revenue Service has the authority to issue and serve a summons beyond

the Boundaries of Title 26 U.S.C.A. § 7621.

IV. Whether Petitioner Wayne L. Patrick and "America Citizen" is a person subject to Title 26 U.S.C.A. § 1 et. seq.

V. Whether the Respondents Joseph Owczarek and Brenda J. Leonard are persons within the meaning of Title 42 U.S.C.A. § 1983.

LIST OF PARTIES TO PROCEEDINGS

IN THE COURT BELOW

This proceeding in the Supreme Court of the United States involves a Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit Civil Case No. 95-2177. The Parties for the Peititioner Wayne L. Patrick, 2863 Chestnut Run Drive, Bloomfield Township, Michigan 48302 **"special appearance"** Proper Person, Pro-Se. For the Respondent as required by Rule when the United States of America is named as a party the Solicitor General, Department of

Justice, 10th and Constitution Ave., N.W., Washington, D.C. 20530, The Director of the Internal Revenue, the Respondents, Joseph Owczarek, 140 S. Saginaw, Pontiac, Michigan 48342 I.R.S. Building place of employment, Respondent, Brenda J. Leonard, 140 S. Saginaw, Ponitac, Michigan 48342.

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OPINION BELOW

The opinion of the United States Court of Appeals en banc appears at Appendix A to the petition as is dated DECEMBER4, 1996

The Opinion of the United States District Court appears at Appendix C to the Petition and is dated October 15, 1996.

JURISDICTION

The date on which the United States Court of Appeals for the Sixth Circuit decided my case was:

A timely petition for rehearing was denied by the United States Court of Appeals for the Sixth Circuit on the and a copy of the Order denying rehearing appears at Appendix A. DECEMBER 4, 1996

The Jurisdiction of this Court is involved under Title U.S.C.A. § 1254 (1)

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED

1. The Congress, Constitution, Article 1 § 1 "Legislative

power vested in Congress. All Legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

2. The Congress, Constitution, Article 1, § 8 ch. 18. Enactment of law for execution of governmental posers. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

3. First Amendment: Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the Right of the people peaceable to assemble and to petition the Government for a redress of grievances.

4. Fourth Amendment: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause,

supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

5. Fifth Amendment: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial Jury of the state and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

6. Ninth Amendment: The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

7. The Internal Revenue Code of 1954, including all amendments and enactments to March 1, 1984 Title 26 U.S.C.A. § 1 to 160.

These enactments represent legislative responses to the

needs of American Taxpaying public for a more equitable system of taxation to promote voluntary compliance with the Law, a simplification of complex provisions to further administrative safeguards to ensure fair implementation and enforcement of Internal Revenue Laws.

To determine the tax consequences of recent enactments and to interpret, the provisions of the code, the latest Court constructions of such provisions will be found in this volumes to aid the practitioner.

The Internal Revenue Code of 1954 Constitutes, Title 26 of the Official United States Code, likewise title 26, U.S.C.A. under the same arrangement and section numbering. A citation to the sections of the Internal Revenue Code is, therefore, also a citation to the sections of Title 26, United States Code and U.S.C.A.

8. Title 42 U.S.C.A. § 1983 Civil Actions for deprivation of rights.

Each person who under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the

District of Columbia subjects', or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this Section; any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In this action the Plaintiff, Wayne L. Patrick, filed a five count complaint. This complaint alleges that Joseph Owczarek and Brenda J. Leonard committed the criminal acts of Trespass upon Plaintiff's private property a Misdemeanor under State Law M.C.L.A. § 750.552 and Attempted Breaking and Entering a Dwelling House a Felony under State Law M.C.L.A. § 750.110 and by doing so violated Plaintiff's Constitutional Rights including but not limited to his First, Fourth, Fifth, Ninth and Fourteenth

Amendment rights. Also the Plaintiff alleged that the Collection summons left upon his premises was issued by Joseph Owczarek and Brenda J. Leonard in violation of the Statute allowing its issuance and therefore further violated his Constitutionally protected Rights. These individuals were sued initially in their personal capacities for personal wrongdoing under the color of Law.

The Petitioner further alleged in his original complaint that he was signaled out for attack by the Department of the Treasury. I.R.S. for his stand that as an "American Citizen" with revocation and nullification of statement of citizenship and oath of allegiance on public file with the Oakland County Register of Deeds and service upon the I.R.S. as an American he is not a "person" as defined by the language within the 1939 Salary Tax Act or the 1954 Tax Act of Title 26 U.S.C.A. As being exempt by the direct language of the statute. That during the District Court Proceeding the Petitioner motioned to have a lay person assist during the District Court proceeding, this was denied by the presiding

Judge Gerald Rosen.

In the District Court proceeding the United States moved for substitution and after petitioner objected on the grounds that he was only seeking recovery for personal wrong doing. The District Court allowed substitution by the United States of America. Then, the United States of America moved for dismissal and also immunity for Respondents Owczarek and Leonard pursuant to 28 U.S.C.A. § 2679(d)(2). Thereafter, the Court Ruled on Petitioners District Court Action (Appendix C) granting the Defendants the relief prayed for.

The Petitioner filed a timely appeal before the Sixth Circuit raising the question of law and rearguing the allegations set forth within the District Court proceedings and the Sixth Circuit affirmed the District Court proceedings (Appendix B). After careful review, the Petitioner moved for rehearing en banc and the Court reaffirmed the order of the three judge panel (Appendix A)

Now the Petitioner, Wayne L. Patrick, moved before

this Court for a decision on the law as was raised in the lower Court proceedings. At this time there is a case in controversy to the question of law that only this Court has the authority to decide.

REASONS FOR GRANTING THE PETITION

Your Petitioner expresses a reasonable belief after carefully consideration that there is a case in controversy, and that this controversy is the Question of Law that the Lower Court have passed upon or have erred in deciding this case. The Petitioner relied on prior decisions of the Supreme Court. *United States v. Bishop*, 412 U.S. 346 (1973). That the Constitution of these United States is the supreme Law of the land. *Marbury v. Madison*, 5 U.S. 137 (1803). The Supreme Court has the vested authority as the Judiciary to decide the question of Law being acts' of Congress and Constitutional Questions involved.

ARGUMENT

QUESTION No. I.

In this action the District Court found that the

Petitioner had failed to state a claim upon which relief could be granted. This requires the Court to take all well pled allegations as true. *Belt v. Johnson Motor Lines, Inc.*, 458 F.2d 443 (5th Cir. 1972) It should not be granted unless it is beyond doubt Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U. S. 41 (1957) Furthermore, a pro se complaint is subject to a less stringent standard of review. *Haines v. Kerner*, 404 U.S. 519 (1972) Here the Complaint alleges that the personal defendants illegally trespassed upon the private property of the Petitioner and attempted to break and enter the residence of the Petitioner. These actions are both violative of State Criminal Statutes. As a result of this action the Petitioner has been deprived of his right to be left alone under the Ninth amendment to the Constitution and further his property rights have been seized without due process of law under the Fourteenth Amendment. Further, the Petitioner alleged that the District Court Judge lacked the authority to issue a final order, as a Judge sworn into office

pursuant to Title 28 U.S.C.A. § 551, § 3140 as judge's not being courts of record, and also as judge's within the 1939 tax act. § 4, as judge's whose salary that may be subject to income tax. *Bennett v. General Caster Service* No. 91-2225 (6th Cir. 1992). During the proceedings within the district court and within the Petitioner raised the question of law and with the court lacking authority to decide the question of law to petitioners First, Fourth, Fifth, Ninth Amendment rights. The district court should have passed on the question of law until the question was settled by the Article III Court.

The Petitioner also alleged that the issuance of the Collection Summons was done by the personal Defendants is violation of Statute. Here, the Statute allowing the issuance of a collection summons requires that there first be an assessment of a tax liability against the Petitioner and a Notice of Tax Liability sent to him prior to any collection activity. These very actions were alleged in the complaint

filed in this matter. Yet the lower courts did not even address this well pled fact in determining the viability of Petitioner's Complaint. It is respectfully submitted that a summons issued without authority is void and unenforceable and any action taken to enforce it would be unlawful and a deprivation of the Petitioner's due process rights under the Fourteenth Amendment.

QUESTION NO II.

The Petitioner sought aid and assistance of a lay person exercising his constitutional rights of counsel of his own choice under the Fifth Amendment and freedom of association under the First Amendment. This was denied to him by Judge Rosen under 28 U.S.C.A. § 1654 and Local Rule 110.4. The American bar is only an organization, like the State bar of Michigan *Baird v. Arizona*, 401 U.S. 1 (1971) The right to practice law is not by grace, but of right. *U.S. Term, Inc. v. Thornton*, 114 S.Ct. 2703 (1994) at and the issue in *Powell v. McCormick*, 395 U.S. 486, 547 (1969) The right to be represented by men of their own choice not by rule

or policy. The Court Judge Rosen should have questioned the lay person (Douglas Bennett) *Schware v. Board of Bar Examiners*, 4 Wall 333 (1867). The Constitution is not only the direct basic expression of the sovereign will of the People. *Marybury v. Madison*, supra It is also the absolute rule of action and decision for all departments and officers of government, with respect to all matters covered by it, and must control as it is written. Article 1 § 8 Ch. 18 Enactment of laws for execution of governmental powers, until it is charged by the authority which established it. *State ex. Rel. Crenshaw v. Joseph*, 175 Ala. 579, 57 So. 942,( ) *Schmitt v. F. W. Cook Brewing Co*, 187 Ind. 623, 120 N.E. 19 (1918); *Collins v. Marlin*, 209 Pa. 388, 139 A. 122 (1927); *Travelers Insurance Co. v. Marshall*, 124 Tex. 45, 76 S.W. 2d 1007 (1934); *Ex-Parte In the matter of A. H. Garland*, 71 U.S. 366 (1867) The Right of Assembly is a guaranteed right by the Constitution of the United States and is the Supreme law of the Land. The Language is unqualified on its face (First Amendment) and there is no mention that Petitioner must

have an attorney, an officer of the Court, that first owes a duty to the Court.

Undoubtedly, the American Bar has broad powers to regulate the practice of law within the Federal Legislative Courts. This control cannot interfere or ignore the rights of individuals secured by the Constitution. *N.A.A.C.P. v. Buttons*, supra; *Gideon v. Wainwright*, 372 U. S. 335 (1963) The right to petition the Courts cannot be handicapped. *Chicago Bar Association v. Chicago Motor Club*, 362 Ind. 50, 199 N. E. 1 (1935) , *Rhode Island Bar Association v. Automobile Services Association*, 55 R.I. 120, 179 A. 130 ( ) *Senier v. Oregon State Board of Dental Examiners*, 294 U. S. 608 (1935); *Williams v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483 (1955) When a Legislature sets out to regulate activity which arguably falls within the reach of fundamental Constitutional Rights, the prohibitions against vagueness tightens and the legislature is required to draft the penal statute with particularity and precision. *Buttons* at p. 417. *Herbert v. Louisiana*, 272 U. S. 312-317(1926); *Smith v.*

California, 361 U. S. 147, 151 (1960) *Winters v. New York*, 333 U. S. 507, 509, 510, 516, 518 (1947) It should make no difference that this is not a criminal case but of the danger of a First Amendment violation. *Marcus v. Search Warrant of Property*, 367 U. S. 717, 733(1961) *Smith v. California*, supra (361 U.S. at 151-154); *Speiser v. Randall*, 357 U. S. 513, 526 (1958); *Thomas v. Collins*, 323 U.S. 516, 537 (1924). The Constitution of the United States is still the supreme law of the land, and Congress has the authority to legislative law. Art. 1 § 8, Ch. 18, and this case Title 28 U.S.C.A. § 1654, and Local Court Rule 110.1 clearly violates the First Amendment, and is in conflict with the United States Constitution.

QUESTION NO. III.

The Plaintiff having raised the questions of law in the prior proceeding before the Court now brings this question of law before this Court for review. Whether through an Act of Congress Art. 1 § 8, Ch. 1 the Internal Revenue Service has the authority to issue and serve a summons beyond the

boundaries of Title 26 U.S.C.A. § 7621. The Petitioner throughout the Lower Court Proceedings raised the question of law that he lives, works, and travels throughout the United States, not the Corporate States or Corporate United States, not doing business, or trade with the corporate State or involved in interstate trade with the state of the Federal Government. *United States v. Lopez*, 2 F.3d 1392 (5th Cir. 1993); *United States v. Wrightwood Dairy Co.*, 315 U. S. 110, 119 (1942); *Wackard v. Filburn*, 317 U. S. 111 at 128-129 (1942).

If Congress in passing Title 26 U.S.C.A. § 7621 Internal Revenue Districts (a), (b) Establishment and alteration for the purpose of administer the Internal Revenue Laws. And (b) Defines the boundaries for the purpose mentioned and those boundaries and states are defined as Territory, and possessions of the United States of America as; the water around Puerto Rico, the Virgin Islands, Guam, Northern Mariannas, Continental Shelf, Indian Reservations and the other federal property [including Washington D. C. as

a state]. But the United States, [in tax law] never means the 50 states. It can mean Federal Property within one of the States of the 50 States (See Jurisdiction over Federal Areas Within the States, Parts I and II)

The property of the Petitioner is outside of the boundaries and Internal Revenue Districts where the administrative Internal Revenue Law shall apply. Therefore the Respondent Owczarek and Leonard acted outside of Title 26 U.S.C.A. § 7261, and your petitioner moves for a ruling at law.

QUESTION NO. IV.

Whether Petitioner Wayne L. Patrick an "American Citizen" is a person subject to Title 26 U.S.C.A. § 1, et. seq. The Question presents the Question of Law of the intent of Art. 1, § 1; Art. 1, § 8, Ch. 18 that constitutes a permissible exercise of Congress Legislative authority to pass law for the purpose of a Revenue Tax within the Constitutional authority, Title 26 U.S.C.A. was passed by an act of Congress. This act of Congress sets forth the intent of the law and the

exemptions set forth within the law. The Law clearly established the fact that as an "American citizen" there is an exemption of the law. The law further states that if the American citizen wishes to voluntary comply with the law. The law provides a simplification of complex provisions to further compliance and administrative safeguards (Administrative safeguards, rule and policy not law)

The petitioner clearly established through the Lower Court proceeding he wishes not to voluntary, and under the law the courts cannot force compliance to the Law. Within filing of the Notice of Citizenship that is on file as public record, and served on several I.R.S. officers. The "Fact" is undisputed in this case, in dispute is the Constitutional fact that the petitioner is not a person within Title 26 U.S.C.A., and he wishes not to voluntarily comply and of the face of the law the Petitioner cannot be forced to comply. Further, the petitioner has valid standing to challenge the validity of the law First, Fifth, Ninth Amendment United States Constitution. *United States v. Butler*, 297 U. S. 1-88 (1935) The Lower Court's

Ruling have failed to conform to the direct language within the statute.

QUESTION NO. V.

Whether Congress through Title 26 U.S.C.A. § 1 has the authority to summon books, records and other documents not defined in Title 26 U.S.C.A. § 6420 (e)(2)

This question was presented to the Lower Court for a ruling at law. As the Petitioner previously stated Respondents Owczarek and Leonard as I.R.S. agents that Petitioner reasonably believes would act according to the law and within Title 26 U.S.C.A. in the execution of an I.R.S. summons.

The Defendants did in "fact" leave on the petitioners property an I.R.S. summons (exhibit part of the file appendix C). This summons required the Plaintiff to produce books, records, and other documents as described. The statutory provision is 26 U.S.C.A. §§ 6420, 6421, 6427.

The summons was not signed by a judge of the Federal Courts. With the burden of proof on the government

as the moving party, to establish a "prima facie" case to show there is a legal reason to justify a collection summons. See *United States v. Powell*, 379 U. S. 48, 58 (1964); *P. A. A. Management, L. T. D. v. United States*, 962 F.2d 212, 215 (2nd Cir. 1992); *Pierre v. United States*, 800 F. Supp. 446, 447 (S.D. Miss. 1992)

Now with the books and records in the possession of the I.R.S. on a related case a reasonable determination should have been made that your Petitioner is not involved in the use of gasoline on farms § 6421, involved in the use of gasoline for non highway purposes or transit systems § 6421, or a user of fuels not used for taxable purposes.

In fact the Petitioner is not a person within Title 26 U.S.C.A. § 1, the records now in the possession of the I.R.S. are personal records of the Plaintiff, not related to " 6420, 6421 and 6427 and that the Lower Court erred within their ruling, and your petitioner moved for a ruling at law whether the I.R.S. had the authority to serve a summons to Plaintiff, and whether the I.R.S. has the authority to Order the Plaintiff

to surrender books and records not within " 6420, 6421 and 6427.

QUESTION NO. VI.

This Court in prior decisions when the question of law was raised pursuant to Title 42 U.S.C.A. § 1983 and whether immunity should be granted to persons who under color of law violate the rights of others, the court has ruled that the Civil Rights Act, by its terms, creates a species of tort liability that on its face admits of no immunities, its language is absolute and unqualified, and not mention is made of any privileges, immunities; rather, it impose liability upon "every person" , who under color of state law or custom, "subject or causes to be subjected any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution and law." 1 The only relief in this action is

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Footnote 1. The Petitioner alleges violation of Petitioner's Fourth and Fifth Amendment rights occurred within the State of Michigan, and Respondent's business address within Washington, D.C. which is referred to as a state, Further M.C.L.A. § 206.12 [Internal Revenue Code] is also a state law

within the Federal Courts, Federal rights are controlled by Federal Law. *Owen v. City of Independence Mo.*, 445 U. S. at 622, 635 (1980) The Respondents were sued in their personal capacity for the civil rights torts which were personally committed. Neither Owczarek nor Leonard are officials which hold high executive positions and with the law well established high state executives officials are not entitled to absolute immunity. *Forrester v. White*, 484 U. S. 219 (1988) or that the doctrine of qualified immunity be extended to respondents. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)

Although *Harlow* involved a Civil Rights claim against Federal officials, the Court stated that the test for qualified immunity [would be the same as under § 1983] and cited Scheuer as the source decision for qualified immunity of executive officials (pages 807-809) *Harlow* also re-stated the justification for rejection of absolute immunity and the importance of damage actions as a vehicle to individual federal violations.

The greater power of High Officials — affords a greater

potential for a regime of lawless conduct — damages against High Officials were therefore an important means of vindication Constitutional guarantees." (page 808) In *Scheure*, the Court drew the distinction between a personal capacity law suit and official capacity law suit. In *Kentucky v. Graham*, 473 U.S. 159 (1990), the Court further defined this distinction and stated:

> "Proper application of this principal is damages against public officials requires careful adherence to the distinction between personal and official capacity action suits. Because this distinction apparently continues to [confuse lawyers and confound Lower Courts] we attempt to define it more clearly through concrete examples of the practical and doctrinal differences between personal and official capacity actions." (page 165)

The Court then set forth the following criteria:

1. A personal capacity suit seeks to impose personal liability upon a governmental official for actions taken by the government official under the color of state law.

2. An official capacity suit is generally only another way of pleading an action against the governmental entity of which

the official is an agent.2

3. In an official capacity law suit, the government entity is the real party in interest. An award of damages in such a suit can be collected from the government entity only. An award of damages in a personal capacity law suit can be collected only from the officials personal assets'.

4. To establish liability in a personal capacity law suit, it is enough to show that the official acting under color of state law, caused the deprivation of a federal right.

5. In an official capacity law suit the Plaintiff must plead and prove that the entity was the moving force behind the deprivation and that the entities policy or custom played a role in the violation of Federal law.

6. In a personal capacity law suit, the official may assert the

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Footnote 2. The Petitioner sued on Owczarek and Leonard the U.S. moved for substitution after the Lower Court granted substitution, the United States of America moved for dismissal and immunity pursuant to Title 28 U.S.C.A. § 2676 (d)(2). The District Court Appendix C held that Petitioner original civil rights suit was only against Joseph Owczarek and Brenda J. Leonard personal in their official capacity as the moving force and monetary claim was from the private purses of Owczarek and Leonard.

personal immunity defenses such as qualified immunity where applicable and absolute immunity where applicable. In an official capacity law suit, these defenses are unavailable.

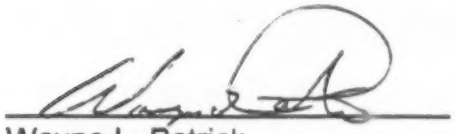
The above criteria should have been applied in this case. The complaint filed by Petitioner alleged only personal action behind the deprivation of his civil rights. With respect to the alleged criminal actions, the Respondents Owczarek and Leonard exceeded their authority under Title 26 U.S.C.A. § ; Treasury Order 150-10, 26 C.F.R. § 301.7602-1 and the Rule, policy and procedures as set forth by well established law.

The Petitioner did not name the Untied States of America as a Defendant, nor was Petitioner seeking damages from the Untied States of America. The Complaint identified Owczarek and Leonard personally as the civil rights tortfeasors and it was their personal conduct that was alleged to have caused the deprivation of petitioners civil rights. The Court erred in allowing substitution of the United States as party Defendants.

CONCLUSION

For these reasons your Petitioner believes that the Lower Courts erred and therefore brings this Petition before this Court for review and prays that this Court grant Certiorari.

Respectfully submitted



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RESPONDENTS

PROOF OF SERVICE

I, Douglas Bennett, do swear that on February 4, 1997, as required by Supreme Court Rule 29, I have served a required by Supreme Court Rule 29.3 Three copies of Petitoner's Writ of Certiorari on the following parties:

The Solicitor General
of the United States
Room 5614
Department of Judtice
10th St. Constitutional
Ave. N. W.
Washington, D.C. 20530

District Counsel
Internal Revenue Service
477 Michigan Ave.
McNamara-Bldg.
Detroit, Michigan 48226

Joseph Owczarek
140 S. Saginaw
Pontiac, Michigan 48342

Brenda J. Leonard
140 S. Saginaw
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United States Attorney
Saul Green

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Gary R. Allen
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John A. Lindquist
Tax Division
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P.O.Box 55
Ben Franklin Station
Washington,D.C. 20044

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 3rd Of February, 1997

Douglas D. Bennett
Vice President
Erie Industries, Inc
810 E. Cambourne
Ferndale, Mi. 48220

AFFIDAVIT OF DOUGLAS D. BENNETT

STATE OF MICHIGAN)
)SS,
COUNTY OF OAKLAND)

COMES NOW, Douglas Bennett, V.P. Erie Industries, Inc. And after being duly sworn, according to law, states that he is your affiant, that as your affiant he has first-hand knowledge of the facts herein and believes these facts to be true and correct to the best of his knowledge and belief. Further your affiant sayeth not.

Douglas D. Bennett

Before me MICHELE M. DEW, a notary public, state of Michigan, personally appeared Douglas D. Bennett who has sworn to and subscribed in my presence the foregoing document on this 4TH Day of February, 1997

NOTARY PUBLIC

My commission expires: 9-17-97

MICHELE M. DEW
NOTARY PUBLIC-OAKLAND COUNTY, MI
MY COMMISSION EXPIRES 09-16-97

APPENDIX A

No. 95-2177
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WAYNE L. PATRICK, Plaintiff-Appellant, v. UNITED STATES OF AMERICA; JOSEPH OWCZAREK, BRENDA J. LEONARD, Defendants-Appellees.	))))ORDER))))NOTRECOMMENDED)FOR FULL TEXT)PUBLICATION)Under Rule 24

Before: KRUPANSKY, BOGGS, and SILER, Circuit Judges.

This matter is before the court for consideration of a petition for rehearing en banc by plaintiff-appellant Wayne L. Patrick and the matter having been circulated to all members of the bench in addition to those hearing the matter. Upon consideration, the panel concluds that it acted under no

misapprehension of law or fact in issuing its opinion and it appearing that the matter was fully considered below. Fed. R. App. P. 40(a)

Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

\Signed\
Clerk

APPENDIX B

No. 95-2177
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WAYNE L. PATRICK, Plaintiff-Appellant, v. UNITED STATES OF AMERICA; JOSEPH OWCZAREK, BRENDA J. LEONARD, Defendants-Appellees)	)	ORDER
	)	NOT RECOMMENDED FOR FULL TEXT PUBLICATION Under Rule 24

Before: KRUPANSKY, BOGGS, and SILER, Circuit Judges.

Wayne L. Patrick, proceeding pro se, appeals a district court judgment dismissing his complaint filed pursuant to the Federal Tort Claims Act (FTCA) and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403

U.S. 388, 390-97 (1971). This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Patrick brought this action against Internal Revenue Service (IRS) agents Joseph Owczarek and Brenda Leonard in their individual capacities, alleging that they deprived him of his First, Fourth and Fifth Amendment rights when they served a collection summons upon him on March 1, 1995. Patrick sought a three judge panel, punitive damages, counsel fees, injunctive relief, and a declaratory judgment. The district court denied Patrick's motion to convene a three judge panel as frivolous, granted the United States motion for substitution, and dismissed the complaint for lack of jurisdiction and for failure to state a claim upon which relief could be granted. This timely appeal followed.

Upon review, we conclude that the United States was properly substituted as party defendant for the individual IRS agents. 28 U.S.C. § 2679(d)(1) provides that the United States is to be substituted as party-defendant in any civil action against a federal government employee if the Attorney General certifies that the employee acted "within the scope of his office or employment at the time of the incident out of which the claim arose." Here, the Attorney General's designate certified that the individual defendants named by Patrick acted within the scope of employment when the acts in question occurred. "The Attorney General's certification provides *prima facie* evidence that the employee was acting within the scope of employment." *RMI Titanium Co. V. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1143 (6th Cir. 1996). Despite Patrick's protests, substitution of the United States as defendant was proper, and required by statute.

Upon further review, we conclude that the district court properly dismissed Patrick's suit as Patrick undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *Wright v. MetroHealth Medical Ctr.*, 58 F.3d 1130, 1138 (6th Cir. 1995), cert. denied, 116 S.Ct. 1041 (1996)

the district court properly dismissed the complaint to the extent that it can be construed to state a claim against the United States pursuant to the FTCA. The United States, as sovereign, may be used only to the extent that it has consented to suit by statute. *United States v. Testan,* 424 U.S. 392, 397 (1976). The United States has waived sovereign immunity to certain tort claims under the FTCA. However, 28 U.S.C. § 2680 provides that the waiver of sovereign immunity does not apply to "[a]ny claim arising in respect to the assessment or collection of any tax . . . ."

Defendants Owczarek's and Leonard's action clearly fall within this statutory exception.

The district court properly dismissed the complaint to the extent that it can be construed to state a claim against the individual IRS agents pursuant to *Bivens*. For Patrick to maintain a *Bivens* action, he must, as a threshold matter, plead that the defendants committed acts which rise to the level of a constitutional violation. *See, e.g., Whittle v. United States*, 7 F.3d 1259, 1262 (6th Cir. 1993). In this case, Patrick has simply alleged that defendants Owczarek and Leonard attempted to enter his home. Even if this allegation is accepted as true, this act does not violate Patrick's Fourth Amendment rights to be free from unreasonable search and seizure. Patrick has not alleged that a search or seizure occurred. Similarly, Patrick cannot maintain a Fifth Amendment action for deprivation of property without due

process, because the defendants simply taped a collection summons to Patrick door. They did not deprive Patrick of any property. Regarding his First Amendment claim, Patrick has not alleged which of the defendants' actions violated his right to free speech, or how his free speech was restrained. Therefore, Patrick's *Bivens* claim was properly dismissed for failure to state a claim upon which relief could be granted.

Even if Patrick had alleged a colorable constitutional violation, dismissal is still proper. In the context of administration of the tax laws, federal courts have consistently declined to create *Bivens* remedies. *See, e.g., Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988)' *McMillen v. United States Dep't of Treasury*, 960 F.2d 187, 191 (1st Cir. 1991)(per curiam); *Wages v. IRS*, 915 F.2d 1230, 1235 (9th Cir. 1990), cert. denied, 498 U.S. 1096 (1991). Accordingly, Patrick cannot maintain a *Bivens* action against IRS agents

Owczarek and Leonard.

For the foregoing reasons, the district court's judgment is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

\SIGNED\

Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WAYNE L. PATRICK
Plaintiff

Civil No. 95-cv-70969
Hon. ANNA DIGGS TAYLOR

v.

UNITED STATE OF AMERICA
JOSEPH OWCZAREK and BRENDA LEONARD
Defendants.
_____/

MEMORANDUM OPINION AND ORDER

Plaintiff, tax protester, Wayne Patrick, has filed this *pro se* complaint, alleging that Defendants violated his First, Fourth, and Fifth Amendment rights. This case is now before the Court on Plaintiff's motion for a three-judge panel, the United States' motionf for substitution pursuant to 28 U.S.C. § 2679(d)(2), and Defendants' motion to dismiss for lack of jurisdiction and failure to state a claim upon which relief may

be granted. For the reasons stated below, Plaintiff's motions id DENIED, the United States' motion is GRANTED, Defendants' motion is GRANTED, and the case is DISMISSED.

I.

Dismissal for failure to state a claim should be granted by this Court as a matter of law if it appears that in the light most favorable to Plaintiff, *Scheuer v. Rhodes*, 416 U.S. 232 (1974), assuming the facts he pleads to be true, *Belt v. Johnson Motor Lines, Inc.*, 458 F.2d 443 (5th Cir. 1972), the complaint fails to state any valid claim for relief, *Balistreri v. Pacifica Police Dep't*, 855 F.2d 1421 (9th Cir. 1988). A complaint should not be dismissed unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957). Furthermore, a *pro se*

complaint is subject to a less stringent standard of review. *Haines v. Kerner*, 404 U.S. 519 (1972).

II.

In his complaint, Plaintiff describes himself as a "free sovereign,,,a native American, not being a member of a political community of the United States of America."1 He has brought this action against Internal Revenue Service ("IRS") agents Joseph Owczarek and Brenda Leonard in their personal capacities, alleging that they deprived him of his First, Fourth and Fifth Amendment rights. Plaintiff's complaint is based upon the events which allegedly occured on March 1, 1995.

Plaintiff claims that on that day, two persons

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1. Plaitiff does not allege that he is "Native American," meaning "American Indian." Instead, Plaintiff claims that he is "native American," which he defines as being a person born in the United States.

approached his home in Bloomfield Township. These persons, presumable IRS agents Leonard and Owczarek, allegedly attempted to enter Plaintiff's home through the front door. When they were unable to open the front door, Leonard and Owczarek tried to enter the house through a side door, but were unsuccesful. They then returned to the front door, where they taped a collection summons. In the process Defendants supposedly frightened Patrick's fifteen year old daughter. Plaitiff claims that by issuing and serving the collection summons, Defendants Leonard and Owczarek violated his Fourth and Fifth Amendment rights.

Plaintiff further alleges that Defendnts have "singled out and targeted" him because he "is not a person required to file an income tax return," thereby depriving him of his First Amendment "right of free speech and political association as a sovereign." He further claims Defendants' actions have

stigmatized him and damaged his standing in the community. Plaintiff also seek a three judge panel, punitive damages, counsel fees, injunctive relief, and declaratory judgment.

The United States acknowledges that agents Leonard and Owczarek did serve a collection summons upon Plaintiff on March 1, 1995. The IRS needed information from Plaintiff to complete his federal income tax returns, which he failed to file for 1992 and 1993.

III.

Plaintiff has filed a motion to convene a three-judge panel pursuant to 28 U.S.C. § 2284. As a threshold matter, this case must fall within the requirements of the three-judge statute. Section 2284(a) provides: "A district court of three judges shall be convened when otherwise required by Act of Congress, or when an actions is filed challenging the constitutionalityof the apportionment of congressional

districts or the apportionment of any statewide legislative body." In this case, it is clear that Plaintiff is unable to meet the statutory requirements for a three judge panel. His action does not challenge the apportionment of congressional districts, or the apportionment of a statewide legislative body. In addition, Plaintiff has not cited any Act of Congress which would require a three-judge panel to adjudicate this action, and this Court is not aware of any such Act. Therefore, Plaintiff's motion to convene a three-judge panel is frivolous, and must be denied.

IV.

The United States has filed a motion for substitution, pursuant to 28 U.S.C. § 2679(d)(1), alleging that Plaintiff filed this action to "thwart" the Internal Revenue Service's efforts to collect his unpaid tax liabilities and to secure

returns which Plaintiff did not file. Section 2679 provides that when the Attorney General has certified that the named defendant "was acting within the scope of his office or employment...[the action]...shall be deemed an action against the United States...and the United States shall be substituted as the party defendant." 28 U.S.C. § 2679(d)(1). In response in opposition to the substitution, Plaintiff has argued that he brought this action pursuant to § 1983 for damages resulting from Defendants' violatin of his civil rights. Plaintiff further claims, "[t]his is a civil rights action, not a tax action." Despite Plaintiff's protests, this Court finds that substitution of the United States as defendant in this action is proper, and required by statute. Plaintiff bases his complaint upon the Defendants' actions on March 1, 1995. Defenants Owczarek and Leonard were clearly acting within the scope of their

employment when they attached a collection summons to Plaintiff's door, and the United States has provided certification to that effect. Therefore, the United States motion for substitution as defendant is granted.

V.

In its motion to dismiss, the United States contends that this action is barred by soveregn immunity. The United States, as a sovereign, may be sued only the extent that it has consented to suit by statute. *United States v. Testan*, 424 U.S. 392, 297 (1976); *Anderson v. Office of Attorney General, Department of Justice*, 890 F.Supp. 648, 650 (E.D. Mich. 1995) Such a waiver of immunity must be explicit, *Block v. North Dakota*, 461 U.S. 273, 289 (1983), and when there is no statute expressly waiving sovereign immunity, the action must be dismissed. *Williams v. U.S.*, 50 F.3d 299, 304 (4th

Cir. 1995); *Dawson v. U.S.*, 894 F.2d 70, 74 (3rd Cir. 1990). In this instatance, Plaintiff's claim sounds in tort. The United States has waived sovereign immunity to certain tort claims under the Federal Tort Claims Act (FTCA). However, 28 U.S.C. § 2675 of the Act provides that a plaintiff must file an administrative claim as a prerequisite to a tort claim action against the United States. *Livera v. First National State Bank of New Jersey*, 879 F.2d 1186, 1194 (3rd Cir. 1989); *Executive Jet Aviation, Inc. v. United States*, 507 F.2d 508, 514-515 (6th Cir. 1974). In this case, Plaintiff has not alleged filing such a claim, thus, this Court must assume that he did not do so. Therefore, Plaitiff's claim under the FTCA is barred, and must be dismissed for lack of jurisdiction.

Further, even if Plaintiff had filed an administrative claim for damages, he would still be unable to maintain the

present action under FTCA. Title 28, section 2680(c) of the United States Code provides that the waiver of sovereign immunity does not apply to "[a]ny claim arising in respect to the assessment or collection of any tax...." 28 U.S.C. § 2680(c). Defendant Owczarek and Leonard's actions clearly fall within this statutory exception. The IRS agents attempted to serve a collection summons, in order to obtain information to complete tax returns Plaintiff failed to file. Therefore, there is no waiver of sovereign immunity, and Plaintiff cannot maintain this action against the United States.

Although this Court has approved the substitution of the United States as a defendant, Plaintiff still maintains that this is an action against defendants Owczarek and Leonard for monetary damages because they allegedly violated his Constitutional rights. Therefore, this Court will address

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comprehensive remedial scheme for redress of the alleged misconduct, the court should decline to create a remedy. *McMillen v. United States Department of Treasury*, 960 F.2d 187, 191 (1st Cir. 1991). In the context of administration of tax laws, federal courts have consistently declined to create *Bivens* remedies. *See, e.g., Schweiker v. Chilicky*, 487 U.S. 412, 425 (1988); *McMillen*, 960 F.2d at 191; *Wages v. Internal Revenue Service*, 915 F.2d 1230, 1235 (9th Cir. 1990). This Court will follow this well-established line of precedential cases. Therefore, Plaintiff may not maintain a *Bivens* actin against Internal Revenue agents Leonard and Owczarek.

***

In as much as Plaintiff has failed to state a cause of action,

Now, therefore:

IT IS ORDERED that Plaintiff's motion to convene a three-judge panel be and hereby is DENIED.

IT IS FURTHER ORDERED that the United States' motion to substitute itself as a defendant pursuant to 28 U.S.C. § 2679(d)(1) be and hereby is GRANTED.

IT IS FURTHER ORDERED that Defendants' motin to dismiss for lack of jurisdiction and failure to state a claim upon which relief may be granted be and hereby is GRANTED.

IT IS ALSO ORDERED that Plaintiff's complaint be and hereby is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED

\SIGNED\

ANNA DIGGS TAYLOR
UNITED STATES DISTRICT JUDGE

Date: Sep. 28, 1995

APPENDIX D

. . . . . UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WAYNE L. PATRICK
Plaintiff,

v. Civil No. 95-CV-70969-DT
Hon. ANNA DIGGS TAYLOR

JOSEPH OWCZAREK AND
BRENDA J. LEONARD,
Defendants.
_____/

ORDER DENYING PLAINTIFF'S MOTIONS FOR RECONSIDERATION

Plaintiff has filed motions for reconsideration of this Court's orders denying a temporary restraining order and denying leave for a lay person to appear before the Court. This case was originally assigned to Judge Rosen of this Court, who denied Plaintiff's requested relief.

The Court having reviewed the file and being otherwise fully advised in the premises,
Now, therefore;

IT IS ORDERED that Plaintiff's motions for reconsideration be and hereby are DENIED, as they fail to demonstrate a palpable defect by which the Court

and the parties have been misled. Furthermore, Plaintiff's motions fail to show that a different disposition of the case would result from a grant thereof.

IT IS SO ORDERED.

\Signed\
ANNA DIGGS TAYLOR
UNITED STATES DISTRICT JUDGE

Dated: Sep 28, 1995